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No. 85-164

IN THE

Supreme Court of the United States

October Term, 1985

STATE OF WASHINGTON, et al.,
Petitioners,

v.

UNITED STATES, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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October 3, 1985

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TABLE OF CONTENTS

	Page
QUESTION PRESENTED	2
STATEMENT OF THE CASE	2
REASONS WHY THE WRIT SHOULD BE DENIED	16
1. The Decision of the Court of Appeals Does Not Conflict With Any Decision of This Court or of Any Court of Appeals.	16
a. This Court's Reasoning in Passenger Fishing Vessel Strongly Supports the Analysis Below.	18
b. The Decision Below Does Not Conflict With This Court's Decision in New Mexico v. Mescalero Apache Tribe.	21
2. The Hatchery Issue Is Not An Important Issue of Federal Law Which Should Be Decided by This Court Under Supreme Court Rule 17.1(c).	24
3. The Position the State Seeks to Advance Before This Court Was Not Presented Below to the District Court.	25
CONCLUSION	27

TABLE OF AUTHORITIES

	Page
Cases:	
Adickes v. Kress & Co., 398 U.S. 144 (1970)	26
Antoine v. Washington, 420 U.S. 194 (1975)	22
De Bardeleban v. Cummings, 453 F.2d 320 (5th Cir. 1972)	26
Department of Game v. Puyallup Tribe, 86 Wn.2d 669, 548 P.2d 1058 (1976)	4
Halstead & Mitchell Co. v. United Steel Workers of America, 421 F.2d 1191 (3d Cir. 1969)	26
New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983)	21
Puget Sound Gillnetters v. Moos, 92 Wn.2d 939 (1979)	24, 25
United States v. State of Washington, 384 F. Supp. 312 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976)	3, 4

Page

United States v. State of Washington, 459 F. Supp. 1020 (W.D. Wash. 1974-1978), various appeals dismissed, 573 F.2d 1117, 573 F.2d 1118, 573 F.2d 1121 (9th Cir. 1978), aff'd sub nom., Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979) 3, 5, 17

Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979) passim

Washington State Game Dept. v. Puyallup Tribe (Puyallup II), 414 U.S. 44 (1973) 3, 4, 17

Washington State Game Dept. v. Puyallup Tribe (Puyallup III), 443 U.S. 165 (1979 17

Other Authorities:

6 J. Moore, Moore's Federal Practice § 56.27[1] (1980) 26

10 Wright & Miller, Federal Practice and Procedure: Civil § 2716 (1983) 26

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RESPONDENTS' BRIEF IN OPPOSITION

The Respondent Tribes respectfully request that this Court deny the petition for certiorari seeking review of the decision of the Court of Appeals which is

reported at 759 F.2d 1353 (9th Cir. 1985).

QUESTION PRESENTED

Does the "right of taking fish," secured to certain Washington Tribes by the Stevens Treaties, include the right to take artificially-propagated hatchery fish as well as naturally-propagated fish?

STATEMENT OF THE CASE1/

The "hatchery issue" -- whether artificially-propagated fish as well as natural fish should be apportioned between treaty and non-treaty fishers under the Stevens Treaties -- is part of the continuing litigation in United States v. Wash-

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1/ The Statement of the Case in the State of Washington's Petition for Certiorari is incomplete, and fails to disclose that the Petition raises new issues not presented to the district court. The Tribes supplement it as necessary.

ington.2/ It first arose at oral argument before this Court in Washington State Game Dept. v. Puyallup Tribe (Puyallup II), 414 U.S. 44 (1973), when the State argued that, in allocating steelhead trout on the Puyallup River between Indians and non-Indians, a distinction should be drawn between hatchery and natural fish. This Court reserved decision on the issue, 414 U.S. at 48, but three concurring Justices suggested that the treaty "does not obligate the State of Washington to subsidize

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2/ United States v. State of Washington, 384 F. Supp. 312 (W.D. Wash. 1974) ("Final Decision I"), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976); United States v. State of Washington, 459 F. Supp. 1020 (W.D. Wash. 1974-1978) ("Post-Trial Decisions"), various appeals dismissed, 573 F.2d 1117, 573 F.2d 1118, 573 F.2d 1121 (9th Cir. 1978), aff'd sub nom., Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979). These proceedings are collectively referred to as "Phase I" of United States v. Washington. The hatchery issue constitutes part of "Phase II" of the same case.

the Indian fishery with planted fish paid for by sports fishermen" over and above the annual run in the river "left to its own devices." 414 U.S. at 49-50.

The State then raised the issue in United States v. Washington, arguing that all hatchery fish should be excluded from the tribal allocations for salmon as well as steelhead. District Court Judge Boldt deferred the issue, 384 F. Supp. at 344-45, and ruled that hatchery fish should, in the meantime, be included in the tribal allocations. 384 F. Supp. at 411, 419.

Two years later, after the state court, on remand in Puyallup II, supra, ruled that hatchery steelhead on the Puyallup River should be excluded from any tribal allocation, Department of Game v. Puyallup Tribe, 86 Wn.2d 669, 548 P.2d 1058 (1976), the State unilaterally attempted to remove hatchery fish from the tribal allocations, and Judge Boldt en-

tered a preliminary injunction restraining the State from doing so. 459 F. Supp. 1072-85 (W.D. Wash. 1976), appeal dismissed, April 5, 1977, reh'g denied, May 4, 1977 (9th Cir. No. 76-3757). For each fishing season from 1974 to the present, then, both hatchery and natural fish have been included in the pool of fish apportioned between treaty and non-treaty fishers. Hatchery fish were included, of course, in the district court allocations approved by this Court in Passenger Fishing Vessel.3/

In 1976, Phase II was assigned to District Court Judge William Orrick. After detailed pre-trial and discovery proceedings, Petitioner and Respondents filed

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3/ The hatchery issue was raised again in Passenger Fishing Vessel, but this Court ruled that the district court had not yet reached a final decision on the issue and that it was therefore not fairly subsumed within the grant of certiorari. 443 U.S. at 688 n.30.

cross-motions for summary judgment on the hatchery issue. The Tribes and United States moved for a summary judgment that hatchery fish were "fish" within the meaning of the phrase, "right of taking fish," in the Stevens Treaties, and were thereby included in the allocable population of fish. The State moved to exclude from the population of allocable fish the entire "first generation" of hatchery-produced fish, whether such fish came from State, federal, tribal, private, or cooperative hatcheries. 506 F. Supp. at 197; App. B.19. The State did not argue, as it does here, that some but not all hatchery fish should be included in the allocations based on variables such as source of funding or hatchery ownership, and at oral argument before the district court the State stipulated that there were no genuine issues of material fact precluding resolution of the hatchery issue by sum-

mary judgment.4/ See Transcript of Oral Argument of April 10, 1980, at 98; 506 F. Supp. at 194 n.25, App. B.14.

The district court's decision, as affirmed on appeal, was based on the follow-

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4/ Pursuant to the Manual for Complex Litigation, Judge Orrick required the parties to exchange detailed statements of factual and legal contentions and admit or deny each of the opposing party's contentions. Judge Orrick also required the parties to prepare a joint stipulation concerning first, the percentage of hatchery-bred salmon and steelhead within the total population of salmon and steelhead in the case area for each decade from 1900 to 1980, second, the percentage of hatchery-bred salmon and steelhead released from State, federal and tribal facilities, and, third, for State-run facilities, the percentage of direct funding from the State government, from license fees, from the federal government, and from other sources. The parties were in substantial agreement as to the answers to the first two questions, and, as to the third question, the fact of federal financial assistance to state hatcheries, as opposed to the exact amount, is undisputed. App. B.18; 506 F. Supp. at 196-97 n.31. For purposes of the summary judgment motions, Judge Orrick accepted the State version of the stipulation wherever there was disagreement with the Tribes concerning the precise figures. Id.

ing uncontroverted facts set forth in the affidavits accompanying the cross-motions for summary judgment, the admissions contained in the proposed stipulations, and certain stipulations filed in Phase I: First, although salmon and steelhead once abounded in the Pacific Northwest, urbanization and intensive development of the case area, including dams, extensive logging operations, and pollution of the watersheds, have "reduced the quality and amount of accessible spawning grounds . . . [and] reduced the rearing capacity of the streams." Joint Biology Statement at 20, 78, 506 F. Supp. at 203, App. B.31. As Judge Orrick put it:

> It is now beyond dispute that natural fish have become relatively scarce, due at least in part to the commercialization of the fishing industry and the degradation of the fishing habitat caused primarily by non-Indian activity in the case area.

506 F. Supp. at 198, App. B.20. See also

Passenger Fishing Vessel, 443 U.S. at 668-69. The State's hatchery program (and the hatchery programs conducted by the United States and the Tribes) have been developed "in order to replace the fish that were artificially lost." 506 F. Supp. at 198, App. B.21. As the Court of Appeals summarized, hatcheries "are designed essentially to replace natural fish lost to non-Indian degradation of the habitat and commercialization of the fishing industry." 759 F.2d at 1360; App. A.12.5/

5/ The State describes its hatchery programs as

> a means of combating losses of fish life caused by environmental changes. They are an aid to crippled streams in producing fish, occasionally a substitute for them. Because of competitive water, land and forest exploitation, it has been necessary to develop controlled methods of sustaining or rehabilitating the stocks of fish which inhabit freshwater streams.

506 F. Supp. at 198, App. B.21., quoting a State publication entitled "Salmon Hatcheries." And: "Hatcheries are intended to replace the production of streams de-

Second, although the percentage of hatchery fish varies from run to run and species to species, hatchery fish constitute a substantial and growing proportion of the total case area fish population. 506 F. Supp. at 198, App. B.21. For example, the percentage of hatchery-bred steelhead increased from 10 percent in 1950 to 60 percent by 1980. Id. On some steelhead runs, 90 percent of the catch is of hatchery origin, and the ratio of wild fish to hatchery fish is expected to continue to decline. Id. During the 1978-79 season, hatchery fish constituted, on the average,6/ approximately 17 percent of the

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stroyed by dams, diversions, pollution or obstructions, and to build up the runs and streams that are not producing to full capacity." Id., referring to State documents quoted in the Affidavit of Howard Droker at 5.

6/ The proportion of hatchery fish fluctuates each year because of variations in the size of the natural runs, variations in the number of hatchery fish re-

salmon in the case area, 506 F. Supp. at 197; App. B.19, but because there are virtually no hatchery-propagated pink and sockeye salmon and those runs are the most numerous and contain the smallest fish,7/ the 17 percent figure does not accurately reflect the real significance of hatchery fish to the treaty allocations. Of the much larger and more valuable species such as chinook, coho and chum, the percentage of hatchery fish is much larger. For example, in 1978-79, approximately 63 percent of the chinook in the case area were of hatchery origin. 506 F. Supp. at 197,

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leased, and other factors. In addition, the predominantly natural pink runs occur only every other year, causing further variations.

7/ Sockeye salmon average 5 to 6 pounds and pink salmon average 4 or 5 pounds. Chinook average 15 to 20 pounds.

App. B.19.8/

Because salmon return to their native streams to spawn, the placement of hatcheries has a significant and distinct impact on the proportion of hatchery and natural fish in each geographically separate usual and accustomed fishing area. 506 F. Supp. at 197, App. B.19. If hatchery fish were excluded from the allocations, each Tribe would therefore be affected differently. For example, most of the predominantly natural pink and sockeye runs pass only through North Puget Sound waters. South Sound runs are more predom-

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8/ Looking at Puget Sound origin runs for the 1978-79 season, 79.4 percent of the chinook, 73.3 percent of the coho, and 23.5 percent of the chum are hatchery fish. Attachment No. 1 to State Proposed Stipulation, CR 6981.

inantly of hatchery-origin chinook, coho and chum.

Third, the Tribes, the United States, and private parties operate hatcheries which contribute substantially to the total hatchery fish population.9/ The State and the Tribes also operate a number of hatchery projects as cooperative joint ventures.

Fourth, the United States provides substantial financial support for State-operated hatcheries. Although the exact percentage of funding from federal sources used to support case area hatcheries is not established, the fact of such support

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9/ According to State figures, federal, tribal, private and cooperative hatcheries accounted for approximately 25 percent of the hatchery-bred steelhead and 22 percent of the hatchery-bred salmon released in the case area in the 1978-79 season. 506 F. Supp. at 202, App. B.28. Again, the proportion varies for each year, for each species, and for each geographic area within the case area.

is undisputed. See 506 F. Supp. at 196 nn.30-31; App. B.18-19; note 4, supra.10/

Fifth, hatchery and natural stocks of the same species occupy the same harvest management area at the same time, and

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10/ In response to Respondent's interrogatories concerning the proportions of State, federal and state license funding of hatchery facilities, the State replied that such information was available only on a statewide basis and was generally unavailable for the case area. In response to Judge Orrick's request for a stipulation, however, the State reported that for FY 1978-79, 39.2 percent of the operation and maintenance costs for state steelhead facilities came directly from the federal government. State Proposed Stipulation at 4.

Funding varies from hatchery to hatchery and is subject to manipulation by the State. One State employee testified that of two hatcheries using brood stock from the Chambers Creek steelhead facility, one was 100 percent State-funded while the other was 50 percent federally-funded. Only steelhead from the State-funded facility were planted in the Puyallup River, while steelhead from the facility receiving federal funds were planted elsewhere in the case area. Deposition of Arthur Westrope, April 4, 1978, at 60. The Tribes believe this was done in the hope of influencing the outcome of the Puyallup litigation.

compete with one another for food and space. To individual fishermen, hatchery and natural fish resemble one another and there has been no demonstration presented in the record that "reasonably accurate or economically feasible" techniques are available to differentiate between them, particularly as they migrate through mixed stock areas where various runs commingle. See 506 F. Supp. 197, App. B.19.

The district court held that hatchery fish should be included in the allocable pool of fish, and the Ninth Circuit Court of Appeals affirmed, noting that the federal government and Tribes directly and indirectly contributed to the population of hatchery fish, and that, in any event, "to allow the source of funding to determine rights would permit the State to buy out treaty fishing rights, not by paying the Tribes, but rather by paying for the replacement of the treaty-protected fish

with unprotected fish . . . . " 759 F.2d at 1359, App. A.12. Noting the mitigation purposes of hatcheries, the Court of Appeals concluded:

> Under those circumstances, it is only just to consider such replacement fish as subject to treaty allocation. For the Tribes to bear the full burden of the decline caused by their non-Indian neighbors without sharing the replacement achieved through the hatcheries, would be an inequity and inconsistent with the treaty.

759 F.2d at 1360; App. A.12-13.11/

REASONS WHY THE WRIT SHOULD BE DENIED

1. The Decision of the Court of Appeals Does Not Conflict With Any Decision of This Court or of Any Court of Appeals.

The State of Washington in its Petition argues that this Court has recognized

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11/ Although two petitions for en banc rehearing were granted by the court below, they did not concern the hatchery issue. Ten Judges concurred in the hatchery ruling, and the eleventh judge dissented on a procedural issue not raised in the petition.

the existence of a "hatchery fish issue" in Puyallup II, supra, Washington State Game Dept. v. Puyallup Tribe (Puyallup III), 443 U.S. 165 (1979), and Passenger Fishing Vessel, but the State fails to demonstrate any conflict of decision supporting review by this Court under Supreme Court Rule 17.1(a) or (c). None of the decisions in the Puyallup trilogy address the governing law or the complex biological and economic factors upon which the lower courts' analyses were hinged,12/ and Passenger Fishing Vessel supports a conclusion opposite from that the State advances.

12/ See particularly, United States v. Washington (Post-Trial Decisions), 459 F. Supp. 1020, 1079 (W.D. Wash. 1976), for a catalog of relevant considerations that were not included in the Puyallup record, such as the mitigation function of the State hatcheries, the presence of federal and tribal hatchery programs, the fact of substantial federal assistance for State hatchery programs, and the fact that it was not demonstrated what the Puyallup River "left to its own devices" would produce.

a. This Court's Reasoning in Passenger Fishing Vessel Strongly Supports the Analysis Below.

As Judge Orrick explained:

> The inescapable conclusion is that if hatchery fish were to be excluded from the allocation, the Indians' treaty-secured right to an adequate supply of fish -- the right for which they traded millions of acres of valuable land and resources -- would be placed in jeopardy. The Tribes' share would steadily dwindle and the paramount purpose of the treaties would be subverted. Contrary to what the Supreme Court held to be the parties' intentions, non-treaty fishermen would ultimately "crowd the Indians out of any meaningful use of their accustomed places to fish.

506 F. Supp. at 198-99; App. B.22 (citing Passenger Fishing Vessel, 443 U.S. at 676-677). The Court of Appeals, while not accepting all of Judge Orrick's reasoning, concluded:

> . . . Fishing Vessel's holding that the Tribes are entitled under the treaty to an "adequate supply of fish" supports the inclusion of hatchery fish in the allocation . . . This limitation [the 50 percent ceiling] on the amount of fish allocable to the Tribes highlights the need to

> permit them to share equitably in the hatchery fish.

759 F.2d at 1359; App. A.11-12.13/ No conflict with this Court's ruling is presented.

The State's argument that hatchery fish should be excluded from the tribal allocations because such fish were not in existence when the treaties were negotiated is foreclosed by this Court's holding in Passenger Fishing Vessel. The treaties reserved not particular fish but rather a meaningful "right of taking fish," 443 U.S. at 678 (emphasis in original), so as to meet the Indians' "subsistence and com-

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13/ Although this Court's decision in Passenger Fishing Vessel provided a mechanism to reduce the Tribes' allocation upon a showing that fewer fish were needed to meet the Tribes' moderate living needs, see 443 U.S. at 686-87, the State has not so moved. At oral argument before the Court of Appeals below, the State conceded that the Tribes' moderate living needs were not being exceeded by the 50 percent allocation.

mercial needs." 443 U.S. at 679. That the need for hatcheries to replace lost wild fish was unforeseen is no more relevant than that the need for allocation was unforeseen; to give effect to the treaties today, hatchery as well as wild fish must be fairly apportioned.14/

14/ The State also argues that it has "created" new runs that did not historically exist, and augumented runs beyond their natural capacity. Petition at 6, 7. To the very limited extent that that is true, it is only because the State has sometimes chosen to locate hatcheries in geographic areas where natural barriers prevent migration of wild fish or where rearing capacity is limited due to the size of the creek. Such fish are harvested over a wide area, however, and do not diminish the overall mitigative function of hatcheries. Nor should they cloud the reality that hatcheries have failed to reestablish the condition of plentitude that existed at treaty times in the case area. Unfortunately, looking at the case area as a whole, the resource that was once plentiful, "has now become scarce." 443 U.S. at 669.

b. The Decision Below Does Not Conflict With This Court's Decision in New Mexico v. Mescalero Apache Tribe.

In New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983), this Court noted that "New Mexico does not contribute in any significant respect to the maintenance of [on-reservation fish and game] resources," and that the fish and game were either native or created by joint efforts of the Tribe and the Federal Government. 462 U.S. at 342. The Court concluded that New Mexico did not assert a sufficient governmental interest to justify concurrent on-reservation jurisdiction over fish and game. The State attempts to argue here that Mescalero's reference to "certain factors such as location and funding" provides "guidelines" which should govern allocation of hatchery fish under the Stevens Treaties. These factors, the

State argues, were "glossed over" by the district court. Petition at 4.

The issue in Phase II, as in Phase I, however, is not jurisdiction, but allocation -- whether the State may exclude the Tribes from participation in the harvest of hatchery fish. The Tribes do not dispute that the State has jurisdiction to regulate the taking of hatchery fish by Indians just as it does for native fish, subject to appropriate standards, when it is reasonable and necessary for conservation of the species. See Passenger Fishing Vessel, 443 U.S. at 682 (citing Puyallup I, 391 U.S. at 398, 402); see also Antoine v. Washington, 420 U.S. 194, 207-08 (1975). The State asserts here no legitimate conservation interest in hatchery fish; it seeks only to exclude them from the allocations so as to benefit its non-treaty constituency. This Court has not permitted it to allocate natural

fish to the exclusion of the Tribes, and neither Mescalero nor other authority suggests it should be permitted to do so with hatchery fish that replace them.

The record below also belies the State's assertion that the district court or Court of Appeals "glossed over" such factors as funding. As described in the Statement of the Case, both courts explicitly noted that federal financial support of state hatchery programs was undisputed and that substantial federal, tribal and cooperative hatchery programs contributed to the overall population of hatchery fish. Given these factors, and in light of the mitigative purpose of hatchery programs and the practical effect of excluding a steadily increasing proportion of the runs from the treaty allocation, the courts ruled that consistent with federal law, the State could not buy its way

out of its treaty obligation. 759 F.2d at 1359, App. A.12.

2. The Hatchery Issue Is Not An Important Issue of Federal Law Which Should Be Decided by This Court Under Supreme Court Rule 17.1(c).

The hatchery issue, although of paramount practical significance to the Tribes, does not present an important question of federal law. No similar issue is being litigated elsewhere, and the decision below will not substantially affect persons not parties to this litigation. Unlike Passenger Fishing Vessel, no law enforcement crisis is presented, no conflict in decision between state and federal courts exists,15/ and there is no over-

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15/ Hatchery fish have been included in the allocations since 1974, and in 1979, on remand from this Court, the Washington State Supreme Court held that the federal injunction regarding hatchery fish would be honored by the state courts and the issue resolved in federal court. See Puget Sound Gillnetters v. Moos, 92 Wn.2d

riding need for Supreme Court review. Compare Passenger Fishing Vessel, 443 U.S. at 674.

3. The Position the State Seeks to Advance Before This Court Was Not Presented Below to the District Court.

Before the district court, the State stipulated that no genuine issue of material fact was presented by either the Tribes' and Federal Government's or State's motions for summary judgment. 506 F. Supp. at 194 n.25; App. B.14. The State argued below that all hatchery fish should be excluded from the allocation, not that hatchery fish should be allocated based on funding source or other variables. See Statement of the Case,

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939, 953-54 (1979). That holding has been extended to the Puyallup River as well as to the rest of the case area.

supra.16/ An appellant may not overturn a summary judgment by raising in the appellate court an issue of fact that was not plainly disclosed in the trial court,17/ and the issue should not be considered by this Court.

16/ Although the State now argues that hatchery fish can be segregated from natural fish, the State failed to make any such showing below. See 359 F.2d at 1359, App. A.12; 509 F. Supp. at 197, App. B.19. The State now also argues that funding sources are identifiable, but the State's answers to the Tribes' and United States' interrogatories declined to identify sources of funding on the ground that records were not kept on a hatchery-by-hatchery or case-area basis. See note 9, supra.

17/ De Bardeleban v. Cummings, 453 F.2d 320 (5th Cir. 1972); Halstead & Mitchell Co. v. United Steel Workers of America, 421 F.2d 1191 (3d Cir. 1969); 6 Moore's Federal Practice, § 56.27[1] at 56-57 (1980); 10 Wright & Miller, Federal Practice and Procedure: Civil § 2716 at 650-54 (1983) and numerous cases cited. See also Adickes v. Kress & Co., 398 U.S. 144, 147 n.2.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Dated October 3, 1985.

Respectfully submitted,

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